No. 76-1135

In the Supreme Court of the United States

OCTOBER TERM, 1976

DONALD LAVERNE CARLSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the admission into evidence against him of the grand jury testimony of a witness who refused to testify at trial because of threats by petitioner violated his Sixth Amendment right of confrontation and Rule 804(b)(5), Fed. R. Evid.

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of distributing, possessing with intent to distribute, and conspiring to distribute, cocaine in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of seven years' imprisonment and a three-year special parole term on each count. The court of appeals affirmed (Pet. App. A1-A27).

The facts are set forth in some detail in the opinion of the court of appeals (Pet. App. A2-A4). Briefly, they show that

petitioner Carlson and his co-defendants Dahl and Hofstad[1] were tried on three counts: distribution of cocaine on August 13, 1975 (Count III); possession of cocaine with intent to distribute on August 29, 1975 (Count IV); and conspiracy to distribute cocaine from August 13 to August 29, 1975 (Count V).[2] As to the August 13 distribution, the evidence showed that Dahl arranged to sell cocaine to an undercover agent and, after being shown $3,000 in cash by the agent, left with Hofstad and drove to petitioner's place of business. Petitioner, Dahl and Hofstad retired together into a private area of the building and emerged together. Dahl and Hofstad then drove back to where the undercover agent was waiting, sold the cocaine, and returned with the cash to petitioner's place of business, where they joined petitioner in the private warehouse area. Dahl and Hofstad soon departed. Earlier, Dahl had told the undercover agent that "his man" for cocaine would be "close by, but not with" Dahl during the transaction.

As to the count charging petitioner with possession of cocaine with intent to distribute on August 29, 1975, the evidence showed that Dahl met with another undercover agent and offered to sell him a pound of cocaine for $22,000. Dahl told the agent that his "connection" was nicknamed "Pat", which is petitioner's nickname. After completing arrangements for the sale, Dahl and Hofstad met petitioner at Hofstad's place of business, then drove to petitioner's building and returned. Dahl and Hofstad then departed to

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[1]Dahl and Hofstad were tried and convicted together with petitioner. Dahl did not appeal. Hofstad's conviction was affirmed together with petitioner's, and his separate petition for certiorari (No. 76-1115, filed February 12, 1977) is presently pending before this Court.

[2]Count I charged petitioner with distribution of cocaine on July 25, 1975, but this count was severed prior to trial and later dismissed (Pet. App. A2, n. 2). Count II, charging Dahl with distribution on August 8, 1975, was also severed prior to trial.

make the sale, at which point they were arrested. Petitioner was arrested shortly thereafter.

Petitioner does not challenge the foregoing evidence but contends that the court improperly admitted the grand jury testimony of one James Tindall. Tindall had testified before the grand jury that early in August 1975 he had purchased cocaine from petitioner and later sold it to Dahl (Pet. App. A28-A30). The government intended to call Tindall as a trial witness, but on the evening before trial Tindall informed a DEA agent that he did not desire to testify because he feared reprisals, implying that his fear arose because of threats by petitioner (Pet. App. A5). The following day, Tindall stated that he had told the truth to government agents and before the grand jury, and he again implied that his refusal to testify was motivated by threats from petitioner. Called at a hearing outside the presence of the jury, Tindall refused to testify on Fifth Amendment grounds despite a grant of use immunity. After this hearing, in which the court heard evidence establishing that Tindall's refusal to testify was in fact due to petitioner's threats against him (Pet. App. A6), the transcript of Tindall's grand jury testimony was admitted into evidence pursuant to Fed. R. Evid. 804(b)(5). The court instructed the jury that the testimony was received "only as it relates to the intent or knowledge" of petitioner and Dahl "or as a part of a common plan or scheme or as it may show lack of mistake or accident on their part" (Tr. 259).[3]

The court of appeals, in a thorough opinion upon which we rely, held that the grand jury testimony was properly

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[3]Petitioner does not here contend that Tindall's testimony would have been inadmissible if given by him personally at trial. That claim was considered and rejected by the court of appeals (Pet. App. A9-A10 and n. 5). See note 4, *infra*.

admitted under the new "trustworthiness" exception to the hearsay rule embodied in Fed. R. Evid. 804(b)(5) (Pet. App. A7-A12) and that its admission did not violate petitioner's Sixth Amendment rights because petitioner, by intimidating Tindall into refusing to testify, had waived his right of confrontation (Pet. App. A10-A20).[4]

1. Petitioner does not argue that the Sixth Amendment right to confrontation cannot be waived by intimidation of a witness (Pet. 10-12). His claim is simply that the evidence of intimidation here was "vague and contradictory" (Pet. 10). Both courts below found the evidence sufficient to prove intimidation, and the correctness of those essentially factual rulings does not warrant review by this Court.

2. Petitioner's contention that Tindall's grand jury testimony was unreliable (Pet. 8-10) is without merit. Contrary to petitioner's contention (Pet. 10, 12, 13), the fact that Tindall, prior to testifying before the grand jury, had agreed to plead guilty to reduced charges did not deprive his testimony of the "circumstantial guarantees of

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[4]The court of appeals also held that Tindall's testimony was relevant:

> To be admissible under Rule 804(b)(5), the statement must also be offered as evidence of a material fact. This element is satisfied in the present case. The Government was obligated to prove that Carlson intentionally participated in the distribution of cocaine and the conspiracy to distribute cocaine. Tindall's testimony implicated Carlson in a cocaine transaction occurring just six days before the cocaine transaction charged in the distribution count against Carlson and the commencement of the conspiratorial scheme charged in the conspiracy count. The Tindall testimony was relevant and material in that it showed intent, knowledge, a common plan or scheme and the absence of mistake or accident. *United States* v. *Wixom*, 529 F. 2d 217, 220 (8th Cir. 1976); *United States* v. *Conley*, 523 F. 2d 650, 653 (8th Cir. 1975), *cert. denied*, ___ U.S. ___ (1976); *United States* v. *Lewis*, 423 F. 2d 457, 459 (8th Cir.), *cert. denied*, 400 U.S. 905 (1970); Fed. R. Ev. 404(b).

Pet. App. A9-A10 (footnote omitted).

trustworthiness" required by Rule 804(b)(5). As the court of appeals recognized (Pet. App. A8-A9), the statements were made under oath, and any falsehood would have subjected Tindall to the sanctions of perjury; moreover, Tindall reaffirmed the truthfulness of his testimony to the government agents at the time he advised them that he would not testify.[5]

3. Petitioner's claim (Pet. 14) that the Rule's requirement of advance notification was violated is fully answered by the court of appeals, which concluded that "as the need for the grand jury testimony arose due to [petitioner's] own wrongdoing and as [petitioner] was provided a copy of the grand jury testimony two days before it was admitted at trial, [petitioner] was not prejudiced by the lack of any formal notice" (Pet. App. A11).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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[5]Petitioner is also wrong in asserting that Tindall's grand jury testimony lacked corroboration. Corroboration was provided by Dahl's statement to the agent that he would obtain cocaine from his source in a leather shop and evidence that Tindall owned a leather shop (Pet. App. A3). Also corroborative is evidence linking petitioner to the two sales of cocaine which formed the basis for the substantive counts upon which petitioner was convicted (Pet. App. A3-A4).